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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1684

THOMAS M. FAHEY,

Appellant,

against

CHARLES J. HYNES *(Special Prosecutor)*

Appellee.

On appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS THE APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE COURT OF APPEALS

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MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE COURT OF APPEALS

Appellee Charles J. Hynes, Deputy Attorney General of the State of New York and Special State Prosecutor for Nursing Homes, Health and Social Services hereby moves that the Court dismiss this appeal from an order of the Court of Appeals of the State of New York upon the ground that the issues presented are moot and upon the additional ground that the issues are so unsubstantial as not to warrant further argument.

Statement of the Case

The Attorney General of the State of New York and his deputies must, when ordered to do so by the Governor, "inquire into matters concerning the public peace, public safety and public justice." McKinney's Consolidated Laws of New York, Executive Law §63(8). Within the last several years allegations that persons employed in the nursing home industry were defrauding New York State's Medicaid reimbursement program became matters of grave concern to the people of New York. Therefore, on February 7, 1975, Governor Hugh L. Carey issued Executive Order No. 4 by which he directed the Attorney General to

> inquire into matters concerning the public peace, public safety and public justice with respect to possible criminal violations in connection with or in any way related to the management, control, operation or funding of any nursing home, care center, health facility or related entity located in the State of New York, or any principal, agent, supplier or other person involved therewith, and I so direct you to do so in person or by your assistant or deputies and to have the powers and duties specified in such subdivision 8 [of Section 63 of the Executive Law] for the purpose of this requirement.

9 New York Codes, Rules, and Regulations (N.Y.C.R.R.) §3.4.

The Attorney General assigned Deputy Attorney General Charles J. Hynes, the appellee, to conduct the inquiries mandated by Governor Carey's order. On January 23,

1978, Deputy Attorney General Hynes issued a subpoena duces tecum, by authority of Section 63(8) of the Executive Law, to appellant Thomas M. Fahey. Fahey is licensed by New York State to operate the Castle Rest Nursing Home, a skilled nursing facility located in Syracuse, New York. The subpoena commanded Fahey to bring the nursing home's financial books and records for the years 1971 through 1975 to the office of the Deputy Attorney General on January 30, 1978. Fahey's nursing home was required to maintain the subpoenaed records by both federal and state regulations. *See, e.g.*, 42 C.F.R. §405.453(a), (c); 10 N.Y.C.R.R. §§86-2.3, 86-2.7.

Fahey moved to quash the subpoena in New York Supreme Court, contending that the Deputy Attorney General had issued it merely to harass him. An assistant to the Deputy Attorney General replied that the subpoena was issued simply to enable the Deputy Attorney General's office to complete an audit of the Castle Rest Nursing Home. This audit had been commenced, but not properly concluded, shortly after the nursing home investigation began in 1975.

On February 14, 1978 the New York Supreme Court rejected Fahey's contention that the Deputy Attorney General had issued the subpoena for an improper purpose, and denied the motion to quash. Fahey then attempted to take a direct appeal to New York's highest court, the Court of Appeals, on constitutional grounds. He argued that Section 63(8) of the Executive Law and Section 2305(c) of the New York Civil Practice Law and Rules (C.P.L.R.) violated the Fourth, Fifth and Fourteenth Amendments of the Constitution. The enactments, read together, grant the

Attorney General and his Deputies authority to retain subpoenaed records for a reasonable time and under terms and conditions set by the courts. See page 7, *infra*. The Deputy Attorney General moved to dismiss the direct appeal, noting that Fahey had not challenged the statutes as unconstitutional during the proceedings before the Supreme Court. On March 23, 1978 the Court of Appeals ordered Fahey's appeal transferred to the Appellate Division of Supreme Court.

In the Appellate Division, Fahey pursued his new arguments concerning the purported unconstitutionality of Section 63(8) of the Executive Law and Section 2305(c) of the C.P.L.R. He abandoned his contention that the subpoena had been designed to harass him. Deputy Attorney General Hynes again noted that Fahey had not properly raised the constitutional issues in the Supreme Court. Nevertheless, he argued that even if Fahey had raised the issues, the statutes were constitutionally sound. Shortly after both sides had filed their briefs with the Appellate Division, the Court of Appeals handed down its opinion in *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d 383, 377 N.E.2d 446 (1978), in which it upheld both statutes as constitutional. Thereafter, in an order entered on June 2, 1978, the Appellate Division, citing *Moskowitz,* unanimously affirmed the Supreme Court's denial of Fahey's motion to quash the subpoena. *Matter of Fahey* v. *Hynes,* 63 A.D.2d 1119, 406 N.Y.S.2d 712 (4th Dept. 1978).

On June 23, 1978, Fahey docketed in the New York Court of Appeals an appeal as of right on constitutional grounds. *See,* C.P.L.R. §5601(b)(1). Fahey asked the Court of Appeals to entertain the appeal because, in his

view, Section 63(8) of the Executive Law and Section 2305(c) of the Civil Practice Law and Rules authorized warrantless searches and seizures in violation of the Fourth Amendment. Citing the United States Supreme Court's decision in *Marshall* v. *Barlow's Inc.,* —— U.S. ——, 98 S.Ct. 1816 (1978), Fahey asserted that an unconstitutional search occurs whenever a state agency is permitted by statute to retain temporarily materials which a party produces before it in compliance with a subpoena duces tecum. In another vein, Fahey argued that the statutes impermissibly abridged his Fifth Amendment privilege against self-incrimination, because he is the sole owner of the nursing home whose records were sought by the subpoena.

On October 30, 1978, four months after Fahey filed his notice of appeal to the Court of Appeals, the Supreme Court of the United States dismissed for want of a substantial federal question an appeal taken from the New York Court of Appeals' decision in the *Moskowitz* case, *supra. Moskowitz* v. *Hynes,* —— U.S. ——, 99 S.Ct. 302 (1978). The appellant in *Moskowitz,* citing *Marshall* v. *Barlow's Inc., supra,* had argued in his jurisdictional statement to the Supreme Court that the very statutes challenged by Fahey violated the Fourth and Fourteenth Amendments because they purportedly authorized warrantless searches.

After the Supreme Court of the United States dismissed the *Moskowitz* appeal for want of a substantial federal question, the Deputy Attorney General moved in the New York Court of Appeals for a dismissal of Fahey's appeal upon the same ground. The Deputy Attorney General

cited this Court's dismissal of the *Moskowitz* appeal to show that Fahey's Fourth and Fourteenth Amendment claims were meritless. To refute Fahey's Fifth Amendment claim, the Deputy Attorney General pointed out that the Castle Rest Nursing Home had voluntarily chosen to participate in the Medicaid and Medicare programs so that it could be reimbursed for caring for elderly and indigent patients. The Deputy Attorney General argued that because state and federal regulations require the nursing home to maintain the subpoenaed records for government inspection as a condition for its continued participation in these programs, Fahey lacked a viable Fifth Amendment claim in these records.

On February 6, 1979, the New York Court of Appeals granted the Deputy Attorney General's motion, and ordered that Fahey's appeal be dismissed "upon the ground that no substantial constitutional question is directly involved." Appellant's Appendix, at A 1. This is the order from which Fahey appeals to this Court.

After the Court of Appeals entered its order dismissing Fahey's appeal, the clerk of the New York Supreme Court, with whom Fahey had deposited the subpoenaed records during the pendency of the state court litigation, transferred custody of the subpoenaed records to the office of the Deputy Attorney General.

Statutes Involved

Section 2305(c) of the CPLR, which was added by Chapter 451 of the Laws of 1977, provides:

(c) Inspection, examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers, the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasability and appropriateness of making copies of the material. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

Chapter 451 of the Laws of 1977 also amended Section 63(8) of the Executive Law by adding the material in italics indicated below.

The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require *that* any books, *records, documents* or papers relevant or material to the inquiry *be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules.*

POINT I

The subpoena duces tecum which the appellant challenges on this appeal has been satisfied. Therefore, the appeal should be dismissed as moot.

The appellant challenged the lawfulness of a subpoena duces tecum issued by the Deputy Attorney General on the ground that, under state law, this subpoena would permit the Deputy Attorney General to obtain possession of the subpoenaed material for a reasonable period of time for the purpose of his inquiry into the administration, management, control, operation, supervision, funding and quality of nursing homes located in New York State. C.P.L.R. 2305(c). He claimed that this right to possess the subpoenaed materials, without a showing of probable cause, violated the Fourth, Fifth, and Fourteenth Amendments. The New York Court of Appeals disagreed, dismissing his appeal from an order of the Appellate Division which upheld the subpoena as valid. Thereafter, the Deputy Attorney General obtained the subpoenaed books and records from the clerk of the New York Supreme Court, who had been holding them pending the litigation in state court.

On this appeal, the appellant seeks to reverse the Court of Appeals' decision that his challenges to the subpoena are unsubstantial. Since the subpoena has already been satisfied, this relief would not restore him to the *status quo ante*. Therefore, the appellant's appeal should be dismissed as moot. *Cf. Defunis* v. *Odegaard,* 416 U.S. 312 (1974).

POINT II

The arguments made by the appellant in his appeal do not present a substantial federal question. Therefore, his appeal should be dismissed or, in the alternative, the order of the Court of Appeals should be affirmed.

The appellant claims that Section 63(8) of the New York Executive Law and Section 2305(c) of the New York Civil Practice Law and Rules authorize warrantless searches and seizures in violation of the Fourth Amendment. In *Moskowitz* v. *Hynes,* —— U.S. ——, 99 S.Ct. 302 (1978), this Court dismissed for want of a substantial federal question the very same argument directed against these very same statutes. The appellant fails to show how this argument has in some way become substantial during the brief interval between the dismissal of the *Moskowitz* appeal and the docketing of his own.

Fahey also claims on this appeal that the statutes violate the due process clause of the Fourteenth Amendment because they purportedly authorize agencies of New York State to take property without requiring "the State, prior to the taking of property, to satisfy all the fundamentals of due process (notice, evidentiary hearing, and judicial sanction)." Appellant's Jurisdictional Statement, at 4. This argument is unworthy of review by this Court. The New York Court of Appeals in its opinion in *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d 383, 377 N.E.2d 446 (1978), said that under New York law a subpoena itself must give adequate notice of when and where a witness is to produce subpoenaed records. Moreover, according to the Court of

Appeals, "a person served with a non-judicial subpoena duces tecum may challenge it in court if the subpoena requires the production of irrelevant or immaterial documents (*Carlisle* v. *Bennett,* 268 N.Y. 212 [197 N.E.2d 220 (1935)], or is used as an instrument of harassment (*Matter of A'Hearn* v. *Committee on Unlawful Practice of Law of N.Y. County Lawyers' Assn.,* 23 N.Y.2d 916 [246 N.E.2d 166 (1969)], cert. den. 395 U.S. 959." *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d at 393. The Court of Appeals in *Moskowitz* also said that, under Section 63(8) of the Executive Law and Section 2305(c) of the C.P.L.R. a subpoenaed party has a right to petition the New York courts should he wish limits to be imposed upon the terms, and conditions under which the issuer of the subpoena may temporarily retain the subpoenaed materials. *Id.* at 392-393. Thus, the appellant clearly errs in contending that the statutes do not afford due process to subpoenaed parties.

Appellant's proposed Fifth Amendment challenge to the statutes is also unsubstantial. The statutes simply do not abridge the right against self-incrimination. Should a subpoenaed party have a viable Fifth Amendment interest in any of the records sought pursuant to a subpoena, he may move under New York law to quash the subpoena on that ground. *See, Matter of Sigety* v. *Hynes,* 38 N.Y.2d 260, 342 N.E.2d 518, cert. denied 425 U.S. 974 (1975). In any event, appellant clearly does not have such an interest in the records sought by means of the present subpoena. These records are the financial records of a nursing home. Nursing homes in New York State must be licensed by state agencies and must submit to close supervision by these agencies. *See, Matter of Sigety* v. *Hynes, supra,* 38 N.Y.2d, at 268 (1975). Furthermore, nursing home operators are required by government regulations to maintain financial records for inspection by the state and federal agencies as a condition both for its license to operate and for its continued participation in the Medicaid and Medicare programs. *See, e.g.,* 42 C.F.R. §405.453(a), (c); 10 N.Y.C.R.R. §§86-2.3, 86-2.7. *See, Matter of Sigety* v. *Hynes, supra,* 38 N.Y.2d at 368. Fahey affirmatively decided to operate a nursing home which is regulated by the state. Moreover, he freely decided to participate in the state's reimbursement program. Therefore, under the "required records" doctrine which this Court recognized in *Shapiro* v. *United States,* 335 U.S. 1, 17-19 (1948), Fahey lacks a viable Fifth Amendment interest in the subpoenaed records.

Conclusion

The Appellant's appeal should be dismissed. In the alternative, the order of the Court of Appeals should be affirmed.

Respectfully submitted,

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